NO. 22708

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

STADIUM APARTMENTS, INC. et al.,

Appellees.

BRIEF
OF THE STATE OF CALIFORNIA
AS AMICUS CURIAE

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INTRODUCTION AND STATEMENT OF THE ISSUE ON APPEAL

The statement of the facts and statement of the case are contained in the appellant's brief. The issue of this appeal is whether or not the district court erred by including the Idaho period of redemption in the decree of foreclosure obtained by the United States in this action.

The appellant argues that this Court should fashion or adopt a federal rule that a mortgagor's right of redemption under state law does not apply to a mortgage assigned to the United States under the National Housing Act. Although the source of law applicable to the rights and obligations of the United States is federal, we

believe the rule propounded by appellant is contrary to law and contrary to sound policy. It will be argued herein that the inclusion of the Idaho redemption period in the foreclosure decree was proper for the following reasons: first, because Congress in enacting the National Housing Act adopted the mortgage and lien laws of the state in which real estate securing a loan is located; second, because the adoption of a federal rule abrogating the right of redemption conflicts with the federal regulations under which the mortgage foreclosed in this action was insured and is not even authorized by the mortgage itself; third, because the adoption of a rule abrogating the right of redemption is contrary to existing federal case law; and finally, because the creation of such a rule is not necessary for the administration of FHA programs and would disrupt state property law.

ARGUMENT

I. THE PERIOD OF REDEMPTION PRESCRIBED BY IDAHO LAW APPLIES TO THE FORECLOSURE IN THIS ACTION, BECAUSE CONGRESS INCORPORATED STATE MORTGAGE LIEN LAWS INTO THE NATIONAL HOUSING ACT RATHER THAN CREATING A SPECIAL FEDERAL MORTGAGE OR FEDERAL LIEN LAW

In facilitating the building of homes on federal credit, Congress could have created a federal mortgage and a federal lien law. It did not. Instead, it provided a system of insurance of mortgages existing under state laws.

The term mortgage is defined in the National Housing Act as follows:

> "The term 'mortgage' means a first mortgage on real estate, . . .; and the term 'first mortgage' means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby." 12 U.S.C. §§ 1736(a), 1707(a). (Emphasis added.)

This definition of mortgage is not a minor or incidental provision of the National Housing Act but is of crucial importance to the entire statutory scheme. By defining "mortgage" as first liens commonly given in the state in which real property is located, Congress expressly adopted state laws regarding such liens.

Under this scheme, the mortgagee receives the benefit of the insurance after default by assigning all its rights under the mortgage to the United States. 12 U.S.C. § 1743(c). The right of redemption is an important property right as recognized by federal as well as state courts. Parker v. Dacres, 130 U.S. 43; Brine v. Insurance Co., 96 U.S. 627. There is no indication in the National Housing Act that Congress intended to abolish

this very important right when an insured mortgage was assigned to the United States.

On page 19 of its brief, appellant concludes that the failure of Congress to provide for a redemption period in the National Housing Act is a forceful expression that none should exist. The congressional purpose was to adopt the laws as they exist in each state. Creation of a right of redemption in the National Housing Act would disrupt the laws in those states which do not have the right as much as abolition of the right would disrupt the laws of the states which do have it.

In United States v. View Crest Garden Apts., Inc., 268 F.2d 380, the argument that Congress adopted state law into the National Housing Act through the definition of "mortgage" was considered and criticized with reference to the showing necessary to justify appointment of a receiver under a mortgage insured under Title 2 of the National Housing Act. The court stated:

> "The argument is that in adopting the state definition of 'first mortgage,' Congress intended to adopt all the incidents of the mortgage relation under state law including remedies on default and the appointment of receivers. That this is not the case is clear from reading section 1713 of the same

Act which defines certain acts as being in default (part g) and sets out certain remedies that the FHA can pursue such as institution of foreclosure (part k) proceedings without reference to whether or not there is such a remedy for the default described in the State where the property is located." 268 F.2d at 382. (Emphasis theirs.)

It is difficult to see what provisions of section 1713, parts (g) and (k), are inconsistent with state laws. However, under the doctrine of expressio unius est exclusio alterius,[1] the expression of exceptions to state law in section 1713, parts (g) and (k), would exclude by implication all other exceptions to state law.

Since the View Crest decision, the Supreme Court has indicated that state laws should not be replaced with reference to federally guaranteed loans unless displacement was intended by an act of Congress or by valid regulation authorized by an act of Congress (United States v. Shimer, 367 U.S. 374)[2] and has also indicated that federal rules will not be adopted where local interests

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1. "Expression of one thing is the exclusion of another." Black's Law Dictionary (4th ed. 1951) at p. 692.

2. Discussed page 10, infra.

are important and uniformity is not (United States v. Yazell, 382 U.S. 341).[3]

II. THE ADOPTION OF A FEDERAL RULE ABROGATING THE STATE RIGHT OF REDEMPTION VIOLATES THE REGULATIONS UNDER WHICH THE MORTGAGE HEREIN WAS INSURED AND IS NOT EVEN AUTHORIZED BY THE MORTGAGE ITSELF

Insurance of the mortgage foreclosed herein was governed by the regulations promulgated pursuant to section 1742, title 12 of the United States Code.[4] In apparent conformity with the congressional purpose to rely upon local laws relating to mortgage liens, the Housing Administrator promulgated the following regulation:

> "Rights and remedies of mortgagee in event of default or foreclosure. The mortgage must contain a provision or provisions, satisfactory to the Commissioner, giving to the mortgagee, in the event of default or foreclosure of the mortgage, such rights and remedies for the protection and preservation of the property covered by the mortgage and

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3. Discussed page 12, infra.

4. "The Secretary is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter." 12 U.S.C. § 1742.

the income therefrom, as are available under the law or custom of the jurisdiction."
24 C.F.R. § 580.18 (1947 Supp.). (Second emphasis added.)

This regulation clearly contemplates adoption of local law governing rights and remedies under insured mortgages, rather than adoption of uniform federal law.

Lacking evidence of congressional or even administrative intent to abrogate the state right of redemption, appellant relies on the following language of the mortgage itself.

> "'The Mortgagor, to the extent permitted by law, hereby waives the benefit of any and all homestead and exemption laws and of any right to a stay or redemption and the benefit of any moratorium law or laws.'"[5/]

Assuming, arguendo, that a FHA mortgage form could abolish the right of redemption without statutory or regulatory authority, this language does not purport to do so. The waiver is expressly conditioned by the phrase "to the extent permitted by law." Since the United States does not have homestead, exemption, and moratorium laws, the

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5. Appellant's Brief, p. 4.

law referred to is state law. Therefore, the mortgage itself incorporates state law.

III. THE CREATION OF A RULE ABOLISHING THE RIGHT OF REDEMPTION UNDER STATE LAW CONFLICTS WITH EXISTING FEDERAL CASE LAW

In Clarke v. Clarke, 178 U.S. 186, the Supreme Court stated:

> "It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances." 178 U.S. at 191.

Since mortgages are conveyances of land, their effect and construction are governed by the law of the state in which the land is located. The right of redemption under state law has long been recognized in federal law, because it is a property right. Parker v. Dacres, supra; Brine v. Insurance Company, supra.

Even if the right of redemption were only a matter of post judgment procedure, it would be governed by state law. A foreclosure sale is essentially an execution upon the judgment foreclosing the mortgagor's equity of redemption. Rule 69 of the Federal Rules of

Civil Procedure expressly adopts state procedure on execution and thereby limits the United States' remedies on judgments to those provided by state law. United States v. Yazell, supra, at 355; Custer v. McCutcheon, 283 U.S. 514; Fink v. O'Neil, 106 U.S. 272.

Appellant's argument for adoption of a special federal rule abolishing the right of redemption on mortgages insured by the United States is based upon the assertion that such a rule is required to protect the integrity of "nationwide mortgage insurance programs."[6/] Appellant relies on the Supreme Court cases of Clearfield Trust Co. v. United States, 318 U.S. 363, and United States v. Shimer, supra, to support this contention.

In Clearfield the court was determining the extent of the obligation of a guarantor of a forged endorsement on a check drawn by the United States. The court held that federal law controlled federal rights, that in absence of an act of Congress the federal courts would fashion such law, and that it would adopt an uniform federal rule based on the facts of the case before it. The factual basis of Clearfield which required an uniform rule is not present in this case. In adopting an uniform rule, the court stated:

"But reasons which may make state law at times

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6. Appellant's Brief, pp. 8, 13.

> the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty." 318 U.S. at 367.

The foreclosure of a mortgage occurs in only one state, and the right of redemption is subject to the law of only one state. Clearfield is distinguishable from this case for the additional reasons that Congress has incorporated state law in the National Housing Act and that the federal courts have already recognized and adopted the right of redemption in the states where it exists.

United States v. Shimer, supra, is the only Supreme Court case cited where state laws relating to mortgages were displaced by federal law. In this case the lower court applied the Pennsylvania Anti-Deficiency Act to bar a recovery by the United States after foreclosure of a federally guaranteed loan. The Supreme Court held that application of the state anti-deficiency legislation conflicted with the regulations prescribed

by the Veterans Administration, which regulations were validly authorized by section 504 of the Serviceman's Readjustment Act.[8/] Before reaching its conclusion, the Supreme Court carefully analyzed the applicable regulatory scheme which provided an "upset price device." The court concluded that this device was intended to and did provide the same protection as the Pennsylvania Anti-Deficiency Act.

This careful analysis and explanation of the Serviceman's Readjustment Act and the regulations prescribed thereunder strongly implies that state laws should not be overridden unless their replacement was clearly intended. In this case appellant does not show any provisions, statutory or by regulation, which were intended to replace or furnish the protection of the Idaho right of redemption. The rationale of Shimer, therefore, indicates that the Idaho redemption rule should not be abrogated. Furthermore, the right of recovery in Shimer was based on an independent right of indemnity by the Veterans Administration. The right of redemption is not an independent obligation but is an inseparable part of the property law defining the rights of the parties to a mortgage.

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8. 58 Stat. 291, as amended by 59 Stat. 626.

A third Supreme Court case has an important bearing on appellant's contention that an uniform rule should be adopted. In United States v. Yazell, supra, the Supreme Court affirmed a summary judgment denying the United States recovery on a contract between the Small Business Association and a Texas woman who did not have capacity to contract under a Texas law of coverture. In holding that there was no federal interest requiring state law to be overridden, the court stated:

> "Although it is unnecessary to decide in the present case whether the Texas law of coverture should apply ex proprio vigore -- on the theory that the contract here was made pursuant and subject to this provision of state law -- or by 'adoption' as a federal principle, it is clear that the state rule should govern. There is here no need for uniformity. There is no problem in complying with state law; in fact, SBA transactions in each State are specifically and in great detail adapted to state law." 382 U.S. at 357.

Since FHA transactions are also tailored to state law, there is no need for uniformity.[9/] The court in Yazell

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9. See 24 C.F.R. § 580.18 (1947 Supp.).

reasoned that family law was an important matter of local interest. The right of redemption is part of state property law, which is also important as a matter of local interest.

Appellant also relies heavily upon two Ninth Circuit cases, View Crest, supra, and Clark Investment Company v. United States, 364 F.2d 7, to support its contention. In View Crest the issue involved was the showing necessary to obtain a receiver pursuant to an express agreement contained in a FHA insured mortgage. Although the court adopted a federal rule inconsistent with state law, it expressly excluded the right of redemption from its conclusions, stating:

> "It is urged that to hold that federal law applies would result in great hardship to mortgagors who would thereby be deprived of all rights under state law such as the right of redemption. We do not think that such a conclusion necessarily follows. A court confronted with that question could determine it by weighing the federal interest against the particular local policy involved. If the considerations weighed by the court suggest an adoption of local law, such as the local rule on redemption, that could be done." 268 F.2d at 383. (Emphasis added.)

Clark Investment, Inc. v. United States, supra, involved the right to rents collected during the redemption period by a receiver appointed under an insured mortgage. The court relying on View Crest also adopted a federal rule contrary to state law. As in View Crest, the court specifically recognized the state right of redemption, stating:

> "The purchaser at the sale gets a title that is subject to defeasance by redemption."
> 364 F.2d at 10.

We believe that the adoption of federal law in both View Crest and Clark Investment is inconsistent with the adoption of state law in the National Housing Act and is contrary to the rationale of both United States v. Shimer, supra, and United States v. Yazell, supra. However, we emphasize that both View Crest and Clark Investment recognize the right of redemption and refrain from including it in the fashioning of an uniform federal rule. Furthermore, both cases are distinguishable from the case at bar because, unlike the right of redemption, the right to appointment of a receiver can be considered as a separate agreement and not a matter of property law. Cf. United States v. Shimer, supra, which holds the right to indemnity a separate agreement.

The other authorities cited by appellant have little or no bearing on its contention that an uniform

federal rule abolishing state redemption rights should be adopted. United States v. Sylacauga Properties, Inc., 323 F.2d 487, involved an appeal from an order of continuance in a foreclosure action. The court said that state law did not apply but did not indicate what state law was involved. Herlong-Sierra Homes, Inc. v. United States, 358 F.2d 300, United States v. Flower Manor, Inc., 344 F.2d 958, and United States v. Walker Park Realty, Inc., 383 F.2d 732, are per curiam decisions which involve deficiency judgments and which do not discuss the federal issues involved. United States v. Allegheny County, 322 U.S. 174, involved state taxation of federal property and does not have any bearing on the need for uniformity of law in the administration of federal mortgage insurance programs. In Madison Properties, Inc. v. United States, 375 F.2d 740, the court expressly assumed for its decision that the Washington right of redemption applied.

Appellant's footnote conclusion on page 19 of its brief that the enactment of 28 U.S.C. § 2410(c) limits by implication the right of redemption is unsound. That section grants the United States the right of redemption in all states. This in no way indicates a congressional intention to abolish the right of redemption of other persons.

IV. THE CREATION OF A FEDERAL RULE ABROGATING THE RIGHT OF REDEMPTION IS NOT NECESSARY TO PROTECT NATIONWIDE MORTGAGE INSURANCE PROGRAMS AND WOULD DISRUPT STATE PROPERTY LAWS

An uniform rule regarding the right of redemption is neither necessary nor contemplated by the FHA statutes and regulations. FHA insured mortgages are made on forms apparently tailored for each state.[10/] The obvious reason for such tailoring is to conform to local law.

The adoption of state law has the advantage of providing a well-defined set of rules in each state. Fashioning of new federal law raises conflicts and uncertainty and, thus, undermines commercial reliance on well-defined property rules. In California, for instance, most real property loans are secured by deeds of trust. If the right of redemption is abrogated on federally insured mortgages to protect the Federal Treasury, then it follows that California regulation of the exercise of the power of sale in a deed of trust should also be abrogated.[11/] Federal courts would probably develop federal common law principles to protect borrowers from unreasonable forfeitures and strict foreclosure.

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10. 24 C.F.R. § 580.18 (1947 Supp.).

11. California Civil Code section 2924 and Code of Civil Procedure section 692 require a minimum waiting period of three months and twenty days before a power of sale may be exercised after default.

But in the meantime borrowers, lenders, title insurers, prospective purchasers, and junior lienors would be in an intolerable state of uncertainty.

The adoption of a federal rule abrogating the right of redemption would disrupt established real property law. In California a mortgage is merely a lien which must be foreclosed. Code Civ. Proc., § 744; Johnson v. Razy, 181 Cal. 342; Prussing v. Prussing, 35 Cal.App.2d 508. A purchaser at a foreclosure sale obtains bare legal title subject to defeasance upon a condition subsequent and does not receive a sheriff's deed until the period of redemption has expired. Code Civ. Proc., § 703. The mortgagor not only has a power to terminate the purchaser's estate but, also, has the right of possession. Mau, Sadler & Co. v. Kearney, 143 Cal. 506; Purser v. Cady, 120 Cal. 214. The right of redemption cannot be abrogated retrospectively even by statute. Barnitz v. Beverly, 163 U.S. 118; Haynes v. Tredway, 133 Cal. 400. Junior lienors also have a valuable right in their power to redeem. Code Civ. Proc., § 703. Adoption of a federal rule abrogating the right of redemption simply abolishes these valuable property rights.

The abolition of the right of redemption for mortgages insured by the Federal Housing Administration does not necessarily creat uniformity. Redemption rights

reflect a balancing of interests between mortgagors and mortgagees. By removing the important right of redemption, this balance is upset. States without redemption rights have other means to protect mortgagors, so the removal of the right of redemption rather than create uniformity may, in fact, create a great disparity between the protection afforded citizens of different states.

Appellant's argument that the right of redemption should be abrogated because it impairs the federal foreclosure remedy is appropriately answered by the language of the Supreme Court in United States v. Yazell, supra:

> "The desire of the Federal Government to collect on its loans is understandable. Perhaps even in the case of a disaster loan, the zeal of its representatives may be commended. But this serves merely to present the question -- not to answer it. Every creditor has the same interest in this respect; every creditor wants to collect." 382 U.S. at 348.

> "This Court held that Revised Statutes § 916, now Rule 69 of the Federal Rules of Civil Procedure, governed, and that the United States' remedies on judgments were limited to those generally provided by state law." 382 U.S. at 355.

The uncertainty created by the adoption of the rule propounded by appellant is demonstrated by comparing the position taken by the appellant in this case and its position in Clark Investment, Inc. v. United States, supra. In Clark Investment the Idaho period of redemption was included in the foreclosure decree and was recognized by this Court. Appellant rationalizes this by asserting that it consented to redemption in Clark Investment, apparently as a matter of grace.[12/] Thus, the existence of the very important right of redemption would seem to depend on the consent and grace of the Federal Housing Administration agents and attorneys acting without statutory or regulatory control.

CONCLUSION

The inclusion of the Idaho period of redemption in the foreclosure decree should be affirmed, because the National Housing Act and applicable regulations contemplate reference to state law. The decision of the district court should also be upheld on the ground that federal case law already recognizes the right of redemption as a property right incorporated into federal law.

Finally, if the Court considers the question as one of fashioning an applicable rule, it should adopt the

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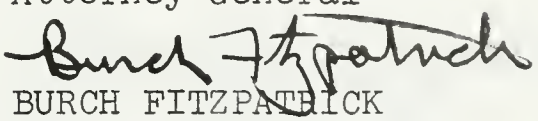
12. Appellant's Brief, p. 18.

state law of redemption, because the importance of reliance on settled property law and the preservation of valuable property rights far outweigh any need for uniformity.

DATED: June 26, 1969
San Francisco, California

Respectfully submitted,

THOMAS C. LYNCH
Attorney General



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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Burch Fitzpatrick

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